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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554Federal Communications Commission
Office of the SecretaryReview of Foreign Ownership Policies
for Broadcast, Common Carrier and
Aeronautical Radio Licenses

GN Docket No. 15-236

REPLY COMMENTS

The Commission proposal denies the existence of an Most Favored Nation (MFN) free rider problem for common carrier and broadcast services. An honest assessment, however, requires an acknowledgement that the MFN free rider problem exists. See, e.g., Paul Collier, Why the WTO is deadlocked, Oxford University (June 2005). See also Rodney De Ludema and Anna Maria Mayda, Do Countries Free Ride on MFN?, Georgetown (2008) and T.W. Chao, GATT's Cultural Exemption, 17:4 U. Pa. J. Int'l Econ. L. 1127 (1995). By failing to acknowledge the MFN free rider problem and the damage to our economic and national security, the FCC is on a collision course going down a one way street with the next President.

We are aware that the lenient FCC approach to the entry by an Australian-American billionaire and an Australian news corporation to the U.S. broadcasting market has been a resounding success, but the record shows that this is the exception that proves the rule.

Neither the FCC nor those supporting its proposal have borne the burden of proof that a unilateral trade concession for trade in broadcasting services would be in the public interest. To the contrary, on a bi-partisan basis the FCC has, for a generation, ignored the statutory *same footing as regards privileges* standard for the benefit of British, Japanese, Chinese, German and other foreign-owned corporations in an epic example of corporate capture that, if continued, would suggest the beginnings of a Roman Empire-like decline and fall. Initial FCC reluctance to defend an Open Internet and proposals for the decimation of historic free over the air broadcasting in favor of corporate crony broadband and WiFi threaten the middle class. The destruction of the 20th Century's town square by a perplexed but privileged, elite unaware that its policies are eviscerating the middle class will likely ensure that either a Bernie Sanders or a Donald Trump may become the next President. An Imperial Washington itself may be sacked.

While it is shocking that a former FCC Chairman and Supreme Court clerk did not rely on time-tested common carrier statutory requirements of no unjust or unreasonable discrimination or rates dating to Magna Carta era Thames ferries and instead hung his hat on a transitory legislative effort to game definitional issues under the principle that once bought the FCC should stay bought, the people made clear that they would not permit a rogue FCC to threaten an Open Internet or the \$2 trillion in U.S. exports. The FCC must defend rather than cede our comparative advantage in the Information Age. The Republic will survive; it will not perish from the earth.

It has been shocking to watch that a so-called expert agency has had so little knowledge of the importance of rights-of-way, pole attachments, cell siting requirements and other measures that limit open entry into broadband services and prevent competitive common carrier service markets both at home and abroad. Ignoring non-tariff barriers to trade will not make the MFN free rider problem go away. But it will diminish the U.S. comparative advantage in critical Information Age basic telecommunications and information services.

In contrast, to demonstrate its awareness of the folly of the FCC's policies, savvy British businessmen, steeped in the history of the East India Company, sought and obtained permission for a British company's ownership of a mobile common carrier in excess of statutory limits that cost U.S. ratepayers the equivalent of a full peak year's broadband investment and saddled a leading U.S. broadband provider with excessive debt. Caught with a hand in the cookie jar and recognizing that discretion can be the better part of valor, however, those nostalgic for the days of the British Empire set sail facing the uncertain possibility of a Brexit from the European Union. Well-aware that wars have been won on the playing fields of Eton, we wish them well. But we are not encouraged by the schoolboy approach of if you can't win, don't join them, but just take your ball and go home. See, e.g., Cynthia Kroet, UK Commons Leader Calls EU 'disastrous' for Britain, Politico, Jan. 14, 2016.

The coin does not appear to have dropped yet to permit the FCC to make the connection that overtaxation of common carrier service providers and overspending at public expense to promote crony capitalist alternatives have deterred rather than promote broadband deployment in the United States. Rather than looking in the mirror and recognizing that the FCC is not the fairest of them all, the FCC appears on course to damn the torpedoes going full speed ahead despite the unjust and unreasonable rates oppressing U.S. ratepayers from excessive FCC mandated subsidies for favored constituencies. While King John might be proud of these would-be Robin Hoods sticking their hands in the middle class purse, those fleeced understand that a perplexed elite cannot see the forest for the trees and why so many have left for independent and hopefully greener pastures.

The good people of Sherwood recognize that revolving door, crony capitalist, former FCC commissioners and staff have obtained permission for foreign-owned companies to operate in excess of statutory limits despite the MFN free rider problem. Indeed, after trying, and failing, to obtain market access for U.S. companies since the establishment of a protectionist NTT Law in the 1980's the FCC nevertheless granted a Japanese company's application to purchase Sprint. This FCC grant did not result in the hoped for increase in broadband investment, but Sprint warehousing of spectrum, pending job cuts and a possible future bankruptcy filing. It is a *prima facie* reason for revisiting the FCC MFN free rider approach rather than expanding it.

Similarly, rather than apply the legal requirement of the *same footing as regards privileges* that would have resulted in the grant rather than denial of an AT&T acquisition of a German state-owned corporation, the FCC provided for a multi-billion dollar payment for a

foreign-owned mobile common carrier operating unlawfully in the United States. Now, instead of giving the U.S. credit for the open U.S. approach, authorities abroad are supporting new protectionism that would threaten four trillion dollars in U.S.-E.U. investment and one trillion dollars in U.S.-E.U. services trade. But we remain optimistic that *nos amis* under the wise guidance of a President from a founding member of the European Community will lead the EU to the right answer and seek a successful conclusion of the Trans-Atlantic Trade and Investment Partnership (TTIP). If the FCC wants to liberalize trade in broadcasting services, TTIP is the forum. We must, however, be patient. Just as Winston Churchill stated that the United States always reaches the right conclusion perhaps *after exploring all other possibilities*, we must wait and watch as the EU itself struggles to determine whether its future lies across the Atlantic or on the Silk Road to Asia. See, e.g. Ryan Heath, Secret Legal Opinion Inflames China Trade Fight, Politico, Jan. 13, 2016. We hope to avoid the interim step of *encourager les autres*.

In the meantime we must ask the question why would a bi-partisan FCC, rather than addressing the long-standing *most favored nation free rider* problem exacerbated by the FCC's departure from the three quarters of a century *same footing as regards privileges* standard established by President Woodrow Wilson at the end of the First World War, feel that an unelected group of five temporary political appointees is wiser than the combined wisdom of Franklin Delano Roosevelt (FDR), Harry Truman, Dwight David Eisenhower, John Fitzgerald Kennedy, Jimmy Carter and Ronald Reagan?

Is the reason hubris, honest graft or just plain ignorance?

If the FCC does not revisit its MFN free rider approach now, we must assume that the answer is hubris or graft.

So, at a minimum, we optimistically hope for a turn away from cocksure ignorance towards thoughtful uncertainty. The proposal can await a TPP vote and a TTIP conclusion.

After 9-11 and our two trillion dollar wars in Iraq and Afghanistan, Europe now faces the greatest risk to Western civilization since Charles Martel or, if you like, Adolph Hitler.

But we can only wonder whether the FCC Commissioners have even heard of Dominique Lapierre and his magnificent work *Is Paris Burning?* We recognize that they are unlikely to recognize that what was once thought humorous in the question *merde, ils se sont de retour?* has taken on a new meaning as events unfold at La Place de la Republique.

FDR appointed a well-known fox to guard the SEC henhouse after the corruption and collapse of the securities markets that resulted in the Great Depression. President Obama apparently saw a similar need to guard the FCC henhouse after seeing the revolving door crony capitalism at the FCC and the construction of a Great Firewall by MFN free riders.

Those in the center of the political spectrum have long recognized the failure of antitrust

policy to address the problem of "too big to fail," but in the absence of anti-trust or trade oversight of extraordinarily large Chinese state-owned enterprises, we cannot help but wonder if the FCC recognizes the potential problem of those "too expensive to exist." See, e.g. Ryan Tracy, Christina Rexrod and Emily Glazer, Not Too Big To Fail, Too Expensive To Exist, Wall Street Journal, Jan 13, 2016.

As members of this Chairman's own party made clear in their December 16, 2015 letter to the U.S. Government Accountability Office, the FCC must focus on enhancing the cyber and physical security of a communications infrastructure essential to national security. Instead, the FCC appears on course for an unprecedented degradation of customer service that would remove the 100 years of reliance for backup power during power outages from catastrophic events such as Hurricane Sandy. See Internet Protocol Transition, FCC Should Strengthen Its Data Collection Efforts to Assess the Transition's Effects, United States Government Accountability Office, December 2015. Time is short. We need this Chairman to step up.

With PRC leadership of both the International Telecommunication Union (ITU) and the International Civil Aviation Organization (ICAO), the decision of the 2015 World Radiocommunication Conference to allocate new frequencies for tracking of airplanes by satellite and the ICAO agreement to provide for global flight tracking, the FCC also cannot afford to fumble a critical national security issue during a "lame duck" year just as the Chairman from The Ohio State University crosses the goal line. See, e.g., Mike Pompeo, The Wrong Way To Fix the FAA, Politico, Jan. 7, 2016. The FCC must not only reconsider its longstanding mistake with regard to common carrier services and abort its proposals for broadcasting, but also actively work with the President to address the national and aviation security issues related to the replacement or supplementation of traditional U.S. ground-based radar by possible MFN free rider tracking of airplanes by satellite.

Should the FCC chose instead to follow a reckless and irresponsible course, the President (this one or the next) will have no choice but to revoke the delegation of authority made by President Eisenhower under 47 U.S.C. 34-39 and 310, and set the ship of state back on course by correcting such an unwise, unlawful, unilateral FCC action, removing MFN free riders and ensuring that the FCC confines market access to those allies willing to liberalize trade on a co-ordinated basis.

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